93-6497

No. 93-1954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FRANK BASIL McFARLAND,

Petitioner,

vs.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

DOES A FEDERAL DISTRICT COURT POSSESS JURISDICTION TO GRANT A STAY OF EXECUTION UNDER EITHER 28 U.S.C. § 2251 OR 28 U.S.C. § 1651(A), IN ORDER TO APPOINT COUNSEL FOR AN INDIGENT *PRO SE* DEATH ROW INMATE WHO HAS NOT YET FILED A HABEAS CORPUS PETITION BUT WHO HAS EXPRESSED AN INTENTION TO FILE A PETITION ONCE COUNSEL IS OBTAINED?

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The Texas Criminal Defense Lawyers Association submits this brief as *amicus curiae*, pursuant to Rule 37 of the Court's rules, to assist the Court in determining whether the federal courts can grant stays of execution to permit counsel to be obtained and to investigate a case sufficiently to prepare a meaningful habeas corpus petition.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Texas Criminal Defense Lawyers Association is a Texas non-profit corporation which has over 1300 members throughout Texas. Its purpose is to "protect and insure by rule of law those individual rights guaranteed by the Texas and federal Constitutions in criminal cases; to resist the constant efforts which are being made to curtail those rights; to encourage cooperation between lawyers engaged in the furtherance of these objectives through educational programs and other assistance; and through this cooperation, education, and assistance to promote justice and the common good." Art. II, Texas Criminal Defense Lawyers Association Bylaws.

Member attorneys of the Texas Criminal Defense Lawyers Association devote at least a substantial part of their practices to the defense of citizens accused of crimes. Frequently, member attorneys serve as counsel to condemned prisoners in state and federal habeas corpus proceedings. The Texas Criminal Defense Lawyers Association thus has an interest in providing the Court with information necessary to a full understanding of the factual and procedural context in which capital habeas cases arise and are litigated. By so doing, the Texas Criminal Defense Lawyers Association hopes to facilitate the proper resolution of the question presented in this case. The Texas Criminal Defense Lawyers Association has obtained the consent of both parties to file this brief, and will lodge with the Clerk letters confirming those consents.

SUMMARY OF ARGUMENT

The Texas Criminal Defense Lawyers Association submits this brief as *amicus curiae* because of its belief that information about the context in which this litigation has arisen is critical to the just disposition of Mr. McFarland's case.

Long before this litigation commenced, it was apparent that Texas faced a looming crisis in the availability of counsel for capital habeas cases. But notwithstanding the growing number of Texas death row inmates in need of counsel to represent them in state and federal habeas proceedings, they usually ended up with counsel who had a meaningful opportunity to do the factual investigations and legal analyses that are the necessary prerequisites to the filing and litigation of proper habeas corpus petitions. This was possible due to a variety of mechanisms that forestalled or stayed execution dates until counsel were located and completed the necessary preparatory work.

However, in late 1993, the federal district courts and the Fifth Circuit eliminated the last of these protective mechanisms. Accordingly, there is now a grave risk that executions will be permitted in Texas in cases in which there has been no meaningful opportunity to prepare adequate habeas corpus petitions. If this occurs, the consequences will be intolerable. The histories of cases in which Texas death row inmates *have* had habeas counsel with appropriate opportunities to represent them demonstrate that if such counsel are no longer available, significant numbers of people will be executed who would instead secure relief if they had such counsel.

ARGUMENT

I.

UNTIL RECENTLY, MOST CAPITAL HABEAS PETITIONERS IN TEXAS HAVE OBTAINED COUNSEL WHO HAVE BEEN PROVIDED A MEANINGFUL OPPORTUNITY TO DO THE NECESSARY FACTUAL AND LEGAL PREPARATORY WORK PRIOR TO FILING PROPER CAPITAL HABEAS PETITIONS

As the ABA's *amicus curiae* brief shows, it is generally recognized that a prerequisite to the filing of an adequate habeas corpus petition in a capital case is a meaningful opportunity for

counsel with adequate resources to (a) review the existing record, (b) undertake a substantial factual investigation to determine whether additional claims should be raised, and (c) undertake legal research on the many complex procedural and substantive issues which these cases typically present.[1]

In many Texas cases, this prerequisite has been difficult to meet, because Texas makes it exceedingly hard to obtain lawyers for death row inmates. Even though Texas courts have the discretion to appoint and compensate counsel and to allow funds for investigation in state habeas proceedings, "this is almost never done."[2] Many Texas lawyers would be willing to represent death-sentenced prisoners in state habeas proceedings if they were compensated, but very few are willing to do so without compensation.[3] Moreover, the few who are willing to undertake *pro bono*

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1 *See* Brief of the American Bar Association As *Amicus Curiae* In Support of Petitioner ("ABA Amicus Brief"), Sections IB, II, III and IV; *see also* The Spangenberg Group, A Study of Representation of Capital Cases in Texas (March 1993) ("Spangenberg 1993 Texas Study") (lodged with the Court by the ABA), at 97 (ineffective assistance of counsel issues, which are first raised in state habeas proceedings, "require substantial time to investigate and because of the lack of uniform quality of appointed counsel in capital cases at trial, as well as the inadequate funding for counsel and experts, ineffectiveness claims have to be filed in most cases").

2 *See* Spangenberg 1993 Texas Study, at vii ("Despite the fact that * * * the Code of Criminal Procedure in Texas gives the district court judges discretion to appoint counsel and to compensate them in state habeas proceedings, this is almost never done. Only three of the 33 attorneys in the study who had served as counsel in state habeas capital cases reported that they received compensation. Despite the fact that district court judges under the statute have the authority to provide funds for experts and expenses, these are almost never approved.")

3 *See* Spangenberg 1993 Texas Study, at 30-32, 36.

representation are discouraged from entering cases by the State's use of execution dates to catapult cases into and through habeas corpus proceedings.[4] As the Spangenberg 1993 Texas Study, prepared for the Texas Bar Association, found:

> * * * It is far more difficult to get a lawyer to step into a case under an active execution warrant than it is when there is substantial time to prepare for the case.
>
> * * *
>
> When warrants are issued in cases where there is no counsel, the results may be dire. An attorney may be recruited hastily and often the recruited counsel have no familiarity with the highly technical capital case legal issues; important constitutional issues are often not raised or properly litigated * * *.[5]

Notwithstanding these adverse conditions, until the latter part of 1993, counsel have usually been secured to represent capital habeas petitioners in Texas and have generally had a meaningful opportunity to do the careful review of the record, extensive

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4 *See id.* at 5 ("Once the Court of Criminal Appeals affirms a sentence of death, the state district court often sets an early execution date."); Texas Resource Center Board of Directors, Crisis in Representation of Texas Death Row Inmates (Oct. 26, 1993) ("Board of Directors Statement") (lodged with the Court by the ABA), at 9 ("the state courts use execution dates to force cases through the system").

5 *See* Spangenberg 1993 Texas Study, at vii, 6.

factual investigation and thorough review of the procedural and substantive legal issues which are necessary to the preparation of adequate habeas corpus claims. These opportunities grew out of a variety of circumstances which enabled death row inmates, and those attempting to secure counsel for them, to overcome the difficulties presented by the general refusal of state habeas judges in Texas to appoint or compensate counsel in these cases and the state courts' use of execution dates soon after the end of direct appeals as a means of docket control.

A. Opportunities Made Possible By Trial Level Courts

In some cases, meaningful opportunities to prepare properly have existed because the state trial level courts did not set early execution dates as a means of controlling their dockets. Instead, they set reasonable time limits for the Texas Resource Center or others to find counsel and for counsel, once found, to file habeas petitions; or they were satisfied to let prosecutors and the Texas Resource Center make arrangements on these matters.[6]

B. Opportunities Made Possible By The Texas Court of Criminal Appeals

In many cases, the Texas Court of Criminal Appeals (sometimes in combination with other courts) granted stays of sufficient length that counsel were able to do the factual and legal work necessary for the preparation of adequate habeas petitions.

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[6] *See* Board of Directors Statement, at 4. For example, in *Ex Parte Mata*, No. 8028 (278th Dist. Ct., Madison Cnty, Texas and Texas Crim. App.), the trial level court (after giving the Texas Resource Center sixty days to recruit state habeas counsel) gave volunteer counsel 120 days, and then 30 additional days, in which to file Mr. Mata's state habeas petition. *See* excerpts from Petitioner's Application for Post-Conviction Writ of Habeas Corpus (lodged with the Court as exhibit 1).

In some instances, counsel who had just begun work on cases were able to secure stays for the express purpose of enabling them to complete the preparatory work necessary to file adequate habeas petitions. An example is the case of Federico Martinez Macias. After this Court denied the direct appeal certiorari petition on February 22, 1988, the trial court set an execution date for May 13, 1988. Volunteer counsel agreed in early March 1988 to represent Mr. Macias. Over the next two months, that counsel did substantial investigatory work but had "only begun to scratch the surface of many serious issues raised in this case."[7] Accordingly, in early May 1988, the volunteer counsel sought a stay of execution to enable the investigation to be completed.[8] Although the district court denied a stay, the Court of Criminal Appeals granted a 60-day stay on May 9, 1988.[9] After that stay expired,

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[7] *See* Emergency Application For Stay Of Execution Pending The Filing Of A Petition For Writ Of Habeas Corpus, May 4, 1988, in *Ex Parte Federico Martinez Macias*, No. 41270-168 (168th Dist. Ct., El Paso Cnty, Texas), at 1-2, 4, 6 (lodged with the Court as exhibit 2).

[8] *Id.*

[9] *See* Order, *Ex Parte Federico Martinez Macias*, Writ No. 17,991-02 (Texas Crim. App. May 9, 1988) (per curiam)(en banc)(lodged with the Court as exhibit 3). In concurring in the granting of the stay, Judge Teague said that "Because this Court will not act to fill the void, and because of the obvious flaws in the system that presently exists, as long as the Legislature is going to let the express train operate within Texas, I believe that it is incumbent upon the Legislature, at the first opportunity, to enact legislation that will provide those passengers whose tickets are stamped 'The death chambers in Huntsville' with the opportunity to be represented by court appointed counsel, should they desire to have such counsel represent them, and they are indigent. * * * Otherwise, I believe that we will continue to see what I believe are mere band aid or stop gap measures that causes justice, if not completely thwarted, at least to be unreasonably delayed." *Id.*, Concurring Opinion (Teague, J.), at 2, 4.

a September 15, 1988 execution date was set, and the volunteer counsel filed Mr. Macias' state habeas petition on September 7, 1988.[10] Thus, counsel for Mr. Macias had a total of six months, from March to September, to review the existing record, perform an extensive factual investigation, do legal research, and prepare an adequate habeas corpus petition. As discussed at pages 10-11 below, the work which Mr. Macias' volunteer counsel did during those six months ultimately led to Mr. Macias' being granted relief in federal habeas corpus proceedings and then, following the grand jury's refusal to re-indict him, his release from prison.

In other cases, the Court of Criminal Appeals granted stays for the express purpose of enabling the Texas Resource Center to secure counsel who would have several months to do the necessary factual and legal preparatory work to enable the filing of an adequate habeas petition. For example, in the case of Ricky Don Blackmon, in which an execution date was set shortly after this Court denied the direct appeal certiorari petition, the Court of Criminal Appeals granted the Resource Center's motion for a 120-day stay to enable it to recruit counsel and for the preparation of a proper habeas petition. The Resource Center was unable to secure counsel but was able itself[11] to develop evidence, including prosecutors' file documents and affidavits from a jailer and informants[12], which supported constitutional claims that were presented in a state habeas petition filed before another execution date was set and in an amended petition filed about two months thereafter.[13] No relief has thus far been granted, but the case has been appealed to the Fifth Circuit,[14] and oral argument has been held.

C. Opportunities Made Possible By Federal Courts

Beginning in the fall of 1991, the Texas Court of Criminal Appeals generally stopped granting stays under the circumstances described in part B, above.[15] For about two years thereafter, when opportunities for preparing adequate habeas petitions were not made available in the manner described in part A, above, the Texas Resource Center was nevertheless usually able to ensure that such adequate opportunities existed. It did so by providing representation itself in a very limited number of cases and by securing stays from federal courts in numerous other cases after

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10 *See* July 19, 1988 Warrant of Execution in *State v. Macias*, No. 41270-168 (168th Dist. Ct., El Paso Cnty, Texas), and cover page of September 6, 1988 Petition for Writ of Habeas Corpus in *Ex Parte Federico Martinez Macias* (168th Dist. Ct., El Paso Cnty, Texas and Texas Crim. App.) (lodged with the Court as exhibits 4 and 5).

11 *See* Notice of Filing Date for Petition for Writ of Habeas Corpus in *Ex Parte Ricky Don Blackmon*, Writ No. 21,554-01 (273rd Dist. Ct., Shelby Cnty, Texas and Texas Crim. App.), at 1 (lodged with the Court as exhibit 6). While the Texas Resource Center has had a limited ability to assume the burden of providing representation itself in some cases, such as Blackmon's, it has never been able to do so in most Texas cases. *See* Spangenberg 1993 Texas Report, at 9.

12 *See* Documents in Support of Application for Post-conviction Writ of Habeas Corpus, Exhibits L-M, P, filed April 2, 1991, and Third Supplemental Documents in Support of Application for Post-Conviction Writ of Habeas Corpus, filed July 22, 1991, in *Ex Parte Ricky Don Blackmon*, Case No. 12-363A (273rd Dist. Ct., Shelby Cnty, Texas and Texas Crim. App.) (lodged with the Court as exhibit 7).

13 *See* Application For Post-Conviction Writ of Habeas Corpus, received Oct. 31, 1990, at 1, 71-72, 132, and Amended Application for Post-Conviction Writ of Habeas Corpus, received Jan. 7, 1991, at 1-10, 23-26, in *Ex Parte Ricky Don Blackmon*, Case No. 12-363A (273rd Dist. Ct., Shelby Cnty, Texas and Texas Crim. App.) (excerpts lodged with the Court as exhibit 8).

14 *See* Reply Brief of Petitioner-Appellant in *Blackmon v. Collins*, No. 92-5192, filed Aug. 11, 1993 (5th Cir.), cover page (lodged with the Court as exhibit 9).

15 *See* Board of Directors Statement, at 5.

filing perfunctory federal habeas corpus petitions, *i.e.*, petitions containing at least one issue which had been raised in state court.[16] During the pendency of such stays, counsel were generally found (or were appointed as part of the stay orders) and then had the time necessary to do the preparatory work which enabled them to file adequate habeas corpus petitions. Since many of the claims in such petitions had not been exhausted, the petitions were often dismissed without prejudice; the unexhausted claims were then presented to the state courts in initial state habeas petitions. Because the federal courts were willing to grant stays to allow this process of claim development to take place, the opportunity necessary for counsel to provide meaningful assistance still existed.

D. Substantial Claims Were Often Developed Due To Such Opportunities

In a significant number of cases, counsel who, as a result of one of the mechanisms described above, had a meaningful opportunity to do the factual and legal work necessary to prepare adequate habeas petitions have presented substantial claims — some of which have already been successful.

One of the most notable examples is that of Federico Martinez Macias, whose case was discussed at pages 7-8 above. As a result of the six-month investigation by volunteer counsel, Macias presented evidence which led the federal district court to conclude that his trial counsel had provided prejudicially ineffective assistance of counsel at both phases of the trial. As a result,

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[16] Among the cases in which such stays were granted were *Caldwell v. Collins*, No. 3: 92 CV 1316-P (N.D. Texas June 30, 1992); *Narvaiz v. Collins*, No. SA-93-CA-0311 (W.D. Texas April 21, 1993); *Sterling v. Collins*, No. 3-93 CV 0147-G (N.D. Texas Jan. 22, 1993); and *White v. Director, TDCJ-ID*, No. 1: 93 CV 168 (E.D. Texas April 14, 1993). Copies of the pertinent orders in these cases are lodged with the Court as exhibits 10-13.

both the conviction and the death sentence were vacated. In so holding, the district court found, *inter alia*, that trial counsel had incompetently failed to call (a) an available alibi witness who could have provided "powerful evidence in support of [Macias'] defense" and (b) an investigator or Macias' daughters, who "could have provided valuable" testimony in refutation of the prosecution's key witnesses. *See Martinez-Macias v. Collins*, 810 F. Supp. 782, 786-87 (W.D. Texas 1991). In affirming the district court's decision, the Fifth Circuit stated:

> We are left with the firm conviction that Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question. The state paid defense counsel $11.84 per hour. Unfortunately, the justice system got only what it paid for.

Martinez-Macias v. Collins, 979 F.2d 1067 (5th Cir. 1992). Thereafter, the District Attorney attempted to persuade a grand jury to reindict Macias, but it refused to do so, and he was released.[17]

After Andrew Lee Mitchell came within five days of being executed, a stay was secured and a volunteer attorney proceeded to represent him properly in state habeas proceedings. The volunteer attorney presented an affidavit from the trial prosecutor "stating that he had found evidence of Mitchell's possible innocence that was not given to him before the trial," including "statements from two police officers who said they had seen the victim

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[17] *See* Hernandez, "Jury Refuses to Indict Man On Double-Killing Charges," El Paso Herald-Post, June 23, 1993, at 1 (lodged with the Court as exhibit 14).

alive after the prosecution claimed the murder had taken place."[18] This meant that the actual murder time could have been a time for which Mitchell had an alibi. On the basis of this evidence, the Texas Court of Criminal Appeals reversed Mitchell's conviction, holding that the State had suppressed critical evidence that could have exonerated Mitchell. *See Ex Parte Mitchell*, 853 S.W.2d 1, 4-6 (Texas Crim. App.) (en banc) *cert. denied*, 114 S. Ct. 183 (1993). Mitchell was subsequently released after thirteen years, seven months and five days on death row (although a retrial was possible). *See* Elliot, "Ex-inmate Takes Part in Debate on Death Penalty," Austin American-Statesman, August 12, 1993, at A1, A13 (lodged with the Court as exhibit 15).

Roger DeGarmo was able to present a successful constitutional claim of prosecutorial misconduct under *Giglio v. United States*, 405 U.S. 150 (1972), after he secured counsel who had a meaningful opportunity to investigate his case. Although DeGarmo lost in the state habeas courts, he prevailed in federal court, on the basis of prosecutorial records and testimony presented by his volunteer counsel which clearly demonstrated a *Giglio* violation. *See DeGarmo v. Collins*, No. H-92-357 (S.D. Texas Aug. 6, 1992), *appeal dismissed*, 984 F.2d 142 (5th Cir. 1993).[19]

There are numerous other cases in which substantial evidence has been developed by volunteer attorneys who have had a meaningful opportunity to investigate. Many of these cases are still awaiting final disposition, but the manner in which the courts have handled them confirms the significance of the claims presented. One such case, still pending, is that of Ricardo Aldape Guerra. The federal district court ordered an evidentiary hearing in *Guerra* after concluding, on the basis of volunteer counsel's investigation, "that the conduct of the police officers and the

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[18] *See* Board of Directors Statement, at 9.

[19] A copy of the district court's decision is lodged with the Court as exhibit 16.

behavior of prosecutors may have tainted the in-court identification resulting in a misidentification." *See Guerra v. Collins*, No. H-93-290 (S.D. Texas Sept. 30, 1993), at 3 (granting evidentiary hearing) (lodged with the Court as exhibit 17); *see also* Board of Directors Statement, at 9-10.

II.

THERE IS NOW, FOR THE FIRST TIME, A GENERAL INABILITY TO SECURE STAYS SUFFICIENT TO AFFORD COUNSEL A MEANINGFUL OPPORTUNITY TO PREPARE ADEQUATE HABEAS PETITIONS

A. The Final Mechanism For Securing Sufficient Stays Has Been Eliminated

The Fifth Circuit's decisions in *Gosch v. Collins*, 8 F.3d 20 (5th Cir.), *aff'g* SA-93-CA-731 (W.D. Texas Sept. 15, 1993), and the present case, *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993) (per curiam), have eliminated the final mechanism for securing a meaningful opportunity to prepare adequate habeas petitions in the many cases in which Texas trial level courts set and do not stay execution dates shortly after this Court denies direct appeal certiorari petitions. That mechanism, as discussed in part IC above, was the granting of stays on the basis of admittedly perfunctory federal habeas petitions. *Gosch* has made stays under such circumstances impossible. In the present case, the Fifth Circuit has held that stays cannot be granted *prior to* the filing of a federal habeas petition. Since, as discussed at page 9 above, the Texas Court of Criminal Appeals has generally discontinued granting stays which enable counsel to prepare adequate habeas petitions, there is now for the first time *no way* to stop executions in the most typical Texas capital cases: cases in which *no* counsel are in position sufficiently in advance of the extremely early execution dates to do the necessary investigatory and legal work which are generally preconditions to filing proper habeas petitions.

Meanwhile, the number of cases in which this situation can arise is increasing. The number of death sentences affirmed by the Court of Criminal Appeals has virtually doubled, and the number of execution dates has increased substantially, over the past two years.[20]

B. This Situation Will Prevent Most Texas Death Row Inmates From Filing Adequate Habeas Petitions

These recent developments have occurred in a state which was already in a capital habeas counsel crisis, due to, *inter alia*, the general lack of appointments of and compensation for counsel in state habeas, the decrease in the willingness of attorneys in private practice to handle these cases, the lack of any centralized mechanism for setting execution dates, and the fact that — in view of the lack of a public defender system in most parts of Texas and the meager payments made to appointed trial counsel — the defense's pre-trial investigation is typically far less complete than in other states.[21] Accordingly, even before late 1993, when it became generally impossible to secure stays that would give counsel a meaningful opportunity to prepare adequate habeas petitions, a report to the Texas State Bar had concluded that "the situation in Texas can only be described as desperate."[22]

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20 The Court of Criminal Appeals affirmed 28 death sentences in 1991, but affirmed 56 death sentences in 1993. As compared to 64 execution dates in Texas in 1991, there were 94 Texas execution dates in 1993. *See* letter dated Jan. 12, 1994 from Mandy Welch to Hon. William Harmon in *State v. Marlin Nelson* (lodged with the Court as exhibit 18), at 1-2; Board of Directors Statement, at 5.

21 *See* Spangenberg 1993 Texas Report, at i-iv, vi-viii, 9, 96-97, 120, 122, 130-31, 146, 151-52, 160-62, 168.

22 *Id.* at 6.

In view of this pre-existing crisis, it is unsurprising that when it *did* become generally impossible to secure stays in Texas capital cases with execution dates set shortly after this Court's denial of direct appeal certiorari petitions, the crisis became considerably worse. Thus, it has become far more difficult to find counsel to handle these cases, and counsel who do take them on do not have a meaningful opportunity to prepare adequate habeas petitions. As of January 12, 1994, there were seven unrepresented Texas death row inmates with execution dates scheduled on or before March 18, 1994[23] — in most instances shortly after this Court's initial denial of certiorari. These are among about 70 Texas death row inmates with no attorneys to handle their habeas proceedings.[24] Under these circumstances, the Texas Resource Center, which even before the general unavailability of stays was "simply not equipped to handle the amount of work required of it by current practices regarding the appointment of counsel in capital cases" — notwithstanding its "enormous effort in a wide variety of areas,"[25] cannot solve the problem by representing most or all of these unrepresented death row inmates itself. *See* ABA Amicus Brief section IA; Petitioner's Brief, Statement of the Case.

Instead, most of the Texas death row inmates who, if they had counsel with a meaningful opportunity to prepare adequate habeas petitions, would have claims as meritorious as those of Federico Martinez Macias, Andrew Lee Mitchell and Roger DeGarmo (see pages 10-12 above) will not be able to find habeas lawyers and will be executed without anyone knowing that they could have presented such strong claims. The Petitioner in this case, Frank McFarland, could be one such person. No one knows whether Mr. McFarland, if properly represented in habeas, could

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23 *See* letter dated Jan. 12, 1994 from Mandy Welch to Hon. William Harmon in *State v. Marlin Nelson*, at 2.

24 *Id.* at 1.

25 *See* Spangenberg 1993 Texas Report, at 9.

present claims as deserving of relief as Macias, Mitchell and DeGarmo. He might be able to do so, but if he and others in his situation are routinely put to death without a meaningful opportunity for habeas counsel to prepare their cases, no one will *ever* know how strong their claims would have been. Instead, in future cases like those of Macias, Mitchell and DeGarmo — in which defense counsel is woefully ineffective or prosecutors or police officers abuse their positions of trust to get convictions — habeas corpus will no longer be available to provide relief. Thus, for people in Mr. McFarland's posture who are unfortunate enough to have no habeas counsel, an affirmance here would in effect amount to a holding that they have no right of access to federal habeas corpus, no matter how unconstitutional their convictions or death sentences may be.

III.

UNLESS THIS COURT REVERSES, THERE WILL SURELY BE EXECUTIONS OF PEOPLE WHO, IF THEY HAD HABEAS COUNSEL WITH A MEANINGFUL OPPORTUNITY TO PREPARE ADEQUATE PETITIONS, WOULD HAVE PRESENTED SUCCESSFUL CLAIMS

In many past cases, such as those discussed in part ID above, Texas death row inmates who had counsel with adequate resources and sufficient time in which to do the necessary review of the record, factual investigation, and legal research have secured relief. It is therefore apparent that if in the future Texas death row inmates typically do *not* have counsel with a meaningful opportunity to prepare, a significant number of death row inmates who would have secured relief if they had had such counsel will be executed in Texas. The fact that we will never know *which* executed people would have presented such claims does not make this tragic conclusion any less of a certainty.

While it is to be hoped that capital trials will usually prove to be "the main event,"[26] the egregious problems with Texas defense counsel at capital trials[27] and the instances of hidden State misconduct (such as in the Mitchell and DeGarmo cases discussed at pages 11-12 above) mean that what should be the "main event" has often been a "fixed fight." Yet, without habeas counsel who have an adequate opportunity to uncover the crucial facts, that "fixed fight" will end up being the *only* "fight," and its loser will be executed without anyone knowing that the fight was "fixed." All we will know is that some victims of "fixed fights" will inevitably be executed.

IV.

UNDER THESE CIRCUMSTANCES, THE STATUTORY RIGHT TO COUNSEL IN FEDERAL HABEAS WILL GENERALLY BE MEANINGLESS IN TEXAS UNLESS THIS COURT REVERSES

As is comprehensively discussed in Petitioner's brief, Congress, in providing for counsel for death row inmates in federal habeas corpus proceedings, intended to ensure that people not go to their deaths without having had habeas counsel with a meaningful opportunity to develop and litigate proper petitions. To return to this Court's "main event" analogy, Congress wanted death row inmates whose "main events" had been "fixed fights" to have counsel who could expose what had happened, so that either a "rematch" could be scheduled or, as in Macias' case, the death row inmate could be declared the "victor."

Congress surely did not contemplate that the statute could be rendered meaningless in states which combine a general refusal to appoint or compensate counsel in state habeas with the frequent

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[26] *See Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

[27] *See* Spangenberg 1993 Texas Report, at iii-iv, vi-vii, 97, 120, 122.

setting of execution dates soon after the denial of direct appeal certiorari petitions. *See* Petitioner's Brief. Accordingly, this Court should reverse the Fifth Circuit's decision here.

CONCLUSION

For all the reasons presented above, and in the Petitioner's Brief and the other *amici curiae* briefs submitted in support of the Petitioner, this Court should reverse the decision of the Court below.

Dated: January 13, 1994

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